No. 21950

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN W. GARDNER, Secretary of Health,
Education and Welfare,

Appellant

v.

PAUL E. SLOANE and ALYSE S. SLOANE,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR APPELLEES

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JURISDICTIONAL STATEMENT.

The jurisdiction of this court is based upon U. S. Const. Art. III, § 1 and § 2, and upon 28 U. S. C. 1291, and 42 U. S. C. 403 (f) (1) and 405 (g), and is predicated upon precisely the pleadings, facts and procedural circumstances set forth in the Opening "Brief And Appendix For Appellant" herein, (pp. 1 and 2).

STATEMENT OF CASE AND ONLY ISSUE

Appellant's statement of case, (pp. 2-5) is correct but insufficiently sets forth the statutory provisions involved. The only issue is whether these provisions of the Social Security Act mean precisely what they say, to-wit:-

> "----Where an individual is entitled to benefits under section 402(a) of this title----on the basis of----self-employment income of such individual, the excess earnings of such individual for any taxable year shall be charged in accordance with the provisions of this subsection before the excess earnings of such persons for a taxable year are charged to months in such individual's taxable year. Notwithstanding the preceding provisions of this paragraph, no part of the excess earnings of an individual shall be charged to any month----in which such individual was age seventy-two or over----. (403(f)(1)).
>
> ----an individual's excess earnings for a taxable year shall be his earnings for such year in excess of the product of $100 multiplied by the number of months in such year----" (403(f)(3), prior to its amendment July 30, 1965.))

"If an individual is entitled to any monthly insurance benefits----during any taxable year in which he has earnings----such individual----shall make a report to the secretary of his earning----for such taxable year. ----Such report need not be made for any taxable year beginning with or after the month in which such individual attained the age of 72." (403)(h)(1)(A) (Emphasis in each instance added.))

According to each of these provisions there would appear to be no ambiguity on the following four points:-

(1) "no part of excess earning of an individual shall be charged to any one month----in which such individual was age seventy-two or over", - "Notwithstanding the preceding provisions of this paragraph";

(2) the "preceding provisions" of paragraph 403(f)(1) were thereby superceded, (if in any wise inconsistent with the foregoing specific exceptions), which would include the provisions, i.e., - "the excess earning of such individual for any taxable year shall be charged----before the excess earnings are charged to months in such individual's taxable year", and it would also supercede any conflicting portions of said section 402(a), and of other "provisions of this subsection" (403(f)(1)), incorporated therein by reference. Said section 402(a) also incorporates section 415(a), subject to subsections 415(b), (c), and (d) thereof, by reference. Section 411 of said Act is by its own provisions made applicable to Section 403(f), and to all other sections and paragraphs of the Social Security Act, (as claimed by appellant), and therefore is subject to the foregoing clause, "notwithstanding the preceding provisions of this paragraph";

(3) "excess earnings for a taxable year shall be----excess of the product of $100 multiplied by the number of months in such year", thereby clearly implying that such "number of months in such year" could be less than twelve months, since a year could never be more than twelve months; and,

(4) "Such report need not be made for any taxable year beginning with or after the month----such individual attained the age of 72."

Appellant's brief contains no discussion of these statutory provisions. Upon what basis, then, does appellant claim that he can charge the excess earnings for any months after the "individual attained the age of 72", in computing the "excess earnings for any taxable year" in which said 72nd age was attained? He alleges two bases.

I.

APPELLANT CLAIMS THAT A TWELVE MONTHS' "TAXABLE YEAR" NECESSARILY APPLIES, AS DEFINED IN THE INTERNAL REVENUE CODE, SINCE SAID CODE DOES NOT PURPORT TO INVOLVE ANY SUCH EXCEPTION AFTER AGE 72, AS DOES THE SOCIAL SECURITY ACT.

The appellant's brief correctly claims that the Social Security Act and the preceding provisions of Section 403(f)(1), do contain conditions to which the exception in the year of appelle's 72nd birthday requires a "notwithstanding" clause. Appellant states that the Act:-

> "expressly incorporates the definition of taxable year contained in the Internal Revenue Code" (p. 8), to-wit:- "42 U.S.C. 411(e) (App. 4a), expressly defines the term 'taxable year' to have the 'same meaning' as when used in the Internal Revenue Code and that 'the taxable year of any individual shall be a calendar year', [except that] under the Internal Revenue Code, 26 U.S.C. 441(b)(3), 26 U.S.C. 443, returns can be made for periods of less than twelve months only in specified enumerated circumstances." (p.10). (See also, p.4).

The Internal Revenue Code thus enumerates three circumstances in which less than twelve months represented a "taxable year" for purposes of that code. These are listed by appellant, and naturally do not include the fourth set of circumstances which were expressly only applicable to the Social Security Act, but also recognize less than 12 months for a "taxable year". This fourth exception in the latter Act was set forth after the "Notwithstanding

otherwise
of this paragraph" of this latter Act, which was/necessarily dependent on said Section 411 thereof, incorporating this provision of the Internal Revenue Act by reference.

Said Section 411, entitled "Definitions relating to self-employment", expressly provides in its opening sentence that certain definitions shall apply - "For the purposes of this subchapter" - (which is "Subchapter II" entitled: "Federal Old Age, Survivors And Disability Insurance Benefits", to-wit, the Social Security Act.) Thus, Section 411 furnishes definitions that are applicable to all sections of the Social Security Act, Title 42, from 401 through 428 Inclusive, - as well as to a number of additional sections - thereby necessarily including sections 402, 403, 411 and 415. Said sub-section 411 by its said introductory clause, became a part of every other section of the act, including the following:- "For the purpose of this subchapter - The term taxable year shall have the same meaning as when used in chapter 1 of Title 26" of the Internal Revenue Code, which brought this definition within the limitation of said "Notwithstanding the preceding provisions" clause of 403(f)(1). It will be noted that this definition would clearly and precisely apply, with no "Notwithstanding" limitation, to those six "taxable years" of the tax paying
that of
individual following/his 65th birthday and preceding the year of his 72nd birthday. Only those two years in which the 65th birthday and the 72nd birthday occurred would constitute taxable years of less than 12 months each, under 403(f)(1)(B).

Appellant has cited no legal precedent, nor have we found any, that upholds his contention for utilizing excess earnings received for a full twelve
in an individual's 72nd year,
months' year,/or that sustains the Social Security Administration's regulation 1813 to like effect. (This Regulation is set forth in Tr. 64, 67, and App. Brief pp. 6 and 11.) The Social Security Act, under its "Nothwithstanding" clause

(last sentence of Sec. 403(f)(1), has merely added four additional situations (designated (A), (B), (C) and (D)), to the three situations theretofore contained in the Internal Revenue Code (26 U.S.C. 441(b)(3) and 443)), recognized in appellant's brief (p. 4 and footnote p.10), where the "taxable year" is recognized as consisting of less than twelve months in these situations. We are here only concerned with situation (B), added by the Security Act, forbidding that any "excess earnings----shall be added to any month----(B) in which such individual was age seventy-two or over". The Social Security Act covers many situations never contemplated by the Internal Revenue Code requiring special provisions. While it adopts the definition of "taxable year" contained in the R evenue Code applicable to most situations, the Security Act nevertheless covered additional exceptions thereto, as provided for in Sec. 403 (f) (1), under its "Notwithstanding" sentence. Otherwise, why should the Social Security Act have also added the further provision that the taxed individual "need not" report his "earnings----for any taxable year---- beginning with or after the month in which such individual attained the age of 72" (403(h)(1)(A)? Why should a report for these latter months be waived if the Administration was required to include them for the full twelve months of that year in its computations? Appellant does not answer these questions.

II.

APPELLANT INCORRECTLY STATES THAT DISTRICT COURT'S DECISION RECOGNIZED THAT APPELLANT'S PAST CONSTRUCTION OF THIS STATUTE HAD BEEN REASONABLE, AS APPELLANT'S QUOTATION FROM SAID DECISION CONTAINED NO SUCH RECOGNITION.

The District Court's decision did declare as follows:-

> The statute is ambiguous at best. It is possible to construe it as the Administration has, if great emphasis is placed on "taxable year" as a word of art. ----However, this construction is contrary to one of the purposes of the act, which is to allow claimants to earn as much as they desire without deduction from their benefits after the age of 72. Further, the wording of that part of paragraph 403(f)(3), which states;---- "the product of $100 multiplied by the number of months in such year----"is significant. Since there are always twelve months in a year, this provision would be mere surplusage if not intended to reduce the length of the taxable year when a claimant is not subject to the provision for the entire year. If the position of the Secretary is correct, it would seem for example, that where a claimant had substantial income early in the taxable year in which he became sixty-five and made initial application for benefits under the old-age provisions of the act, that his previous earnings before submitting a claim would logically be used to eliminate payments in that year. Yet, in this very case there is no evidence that this factor was considered when Mr. Sloane applied for and received full benefits as of July, 1955, when he reached the age of sixty-five. (Emphasis, the court's. Decision pgs. 6 & 7.)

This statement of Judge Zirpoli is a far cry from the declaration by appellant that the District Court had thereby admitted that the Administration's present interpretation "is quite clearly a reasonable interpretation", which "courts may therefore respect", (as appellant applies these quoted words from the decision in Udall v Tallman (380 U.S. 1, 4, 16.)) This latter decision is the only case cited by appellant in his brief. Judge Zirpoli in his above decision did not adopt the language of the Udall decision to the effect that the administrative "interpretation may not be the only one permitted by the language of the order" nor that it was "a reasonable interpretation". (App. Brief, p.14, also cited on p. 9.) These words are very different

from those of Judge Zirpoli, (even as quoted by appellant, pp. 13,14) and do not justify the following argument of appellant:-

> "Indeed, as the district court itself recognized, 'It is possible to construe [the law] as the Administration has', since this construction 'is consistent with the use of the income tax returns to check the earnings of claimants during a taxable year '. (R 26). In these circumstances, where the district court itself recognized that the administrative interpretation was reasonable, the district court, we submit, should not have substituted its own interpretation for that of the administration's.'" (Emphasis added.)

It will here be noted that appellant has here incorrectly inferred that Judge Zirpoli meant "reasonable", where he used the word "possible". The words are not interchangeable. Many interpretations are "possible", that are not "reasonable". The court's detailed explanation of the reasons for its interpretation would have been meaningless if it had not intended to show wherein the Administration's interpretation was unreasonable.

III.

A SPECIAL PROVISION OF A STATUTE RELATING TO A GENERAL SUBJECT GOVERNS IN RESPECT TO THAT SUBJECT.

This is the situation here. California Jurisprudence (45 Cal. Jur. 2d, page 628, Sec. 119 of "Statutes", notes 17-20 inclusive) sets forth this principle:-

> "If possible, effect should be given to both general and special provisions of a statute. Phrases used in the statute must be construed in connection with others, with which they are associated, and particular expressions qualify general. If they are inconsistent and cannot be reconciled, a general provision is controlled by a special provision that is treated as an exception to the general provision. Hence a specific provision relating to a particular subject will govern with respect to that subject, as against a general provision, though the latter standing alone would be broad enough to include the subject. And where two provisions treat a matter, one

specially and solely and the other merely incidentally, the former will prevail."

Zajicek v Koolvent Metal Awning Corp. 283 F2d 127; holding:

"specific language controls general."

See also:- Long Beach City Sch. Dist. v Payne, 219 C 598, 28 P 2d 663, Rose v State, 19 C 2d 713, 123 P 2d 505; People v Wood, 161 CA 2d 24, 325 P 2d 1014;

C.C.P. Sec. 1859 provides:-

"when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it."

The same principle is consistently applied throughout the Federal Courts:-

Korte v U. S. (Cal.) 266 F 2d 633, Certiorari denied 358 U.S. 928, 79 S. Ct. 318;

Bradford Nov. Co. v Manheim (N. Y.) 156 Fed Supp 489;

U. S. v Mattio (Cal.) 17 F. 2d 879;

Aaron v U. S. (Oak.) 204 F 943, 123 CCA 265;

Rodger v U. S., 36 Ct. Cl. 266, Affmd. (1902) 22 S. Ct. 582; 185 U. S. 83.

The implication from a proviso in a statute is that any proceeding not covered by the exception is to be subject to the rule.

Geo. MooreIce Cream Co. v Rose, 289 U.S. 373, 53 S.Ct. 522 77 L. ed. 1265.

We therefore respectfully submit that neither of appellant's grounds can be accepted for ignoring the "notwithstanding" exceptions in the Social Security Act wherein a "taxable year" of less than 12 months is recognized, whereas otherwise the 12 months requirement for a "taxable year" is applied, even as other exceptions are allowed under the Internal Revenue Code.

November 21, 1967.

Paul E. Sloane

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Attorney for Appellee, in propria

CERTIFICATE

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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AFFIDAVIT OF SERVICE

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PAUL E. SLOANE, being duly sworn, deposes and says:

That on November 21, 1967, he caused copies of the foregoing Reply Brief of Appellees to be served upon Appellant by placing them in the United States Mail, postage prepaid, in envelopes addressed to each of the following counsel:

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Subscribed and sworn to before me this 21st day of November, 1967.

Edith L. May
Notary Public EDITH L. MAY

My commission expires: My commission expires May 5, 1969

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